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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PAUL R. ZEROVNIK

Petitioner,

v.

E. F. HUTTON AND CO., INC.,
RICHARD BROWN AND PHYLLIS BENJAMIN

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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December 31, 1984

QUESTIONS PRESENTED

Whether a court's failure to mail customary notice, thereby depriving a litigant of his opportunity to appeal, is repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Whether a litigant, after being deprived of notice, and thereby his opportunity to appeal, is afforded a remedy under the Due Process Clause of the Fourteenth Amendment.

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STATEMENT OF GROUNDS FOR JURISDICTION

On October 3, 1984, the Ohio Supreme Court filed an entry *sua sponte* dismissing the appeal of Paul R. Zerovnik on the ground that no substantial constitutional question existed. This petition for *certiorari* was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* Section 1257(3).

CONSTITUTIONAL - STATUTORY PROVISIONS INVOKED

UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION 1

SECTION 1. CITIZENS OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO RULES OF CIVIL PROCEDURE

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(A) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from

a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under

this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

OHIO RULES OF APPELLATE PROCEDURE

RULE 4. APPEAL AS OF RIGHT - WHEN TAKEN

(A) Appeals in Civil Cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal with ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all

parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of the last of any of the following orders made upon a timely motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

CUYAHOGA COUNTY RULE OF THE COURT OF COMMON PLEAS

RULE 19. JOURNAL ENTRIES

(A) When ordered or directed by the court, counsel for the party in whose favor a calendar entry, order, judgment or decree is entered in a cause in Civil or Domestic Relations Divisons shall, within ten (10) days thereafter unless the time be extended by the court, prepare a proper journal entry and submit the same to counsel for the opposite party who shall approve or reject the same within three (3) days after its receipt by him and may, in case of rejection, file objections thereto in writing with the court.

The judgment entry specified in Ohio Civil Rule 58 shall be journalized within thirty (30) days of the verdict, decree or decision. If such entry is not prepared and presented for journalization

by counsel, then it shall be prepared and journalized by the court.

In all cases where a final title report is required, the above mentioned ten (10) days relative to journal entries shall commence from the date the final title report is filed.

The court shall approve a journal entry deemed by it to be proper, sign the same and cause it to be filed with the Clerk, and notice of the filing of each journal entry for journalization shall, on the day following such filing, be published in the Daily Legal News.

STATEMENT OF THE CASE

This action was brought by plaintiff-appellant, Paul R. Zerovnik (hereinafter "petitioner"), against defendants-appellees E. F. Hutton Company, Inc. and its agents (hereinafter "respondents"), for negligent reporting of financial information, which caused petitioner mental and emotional distress and physical injuries.

Prior to April 10, 1979, petitioner, Mr. Zerovnik, had been negotiating with respondent, Richard Brown, an account executive for respondent E. F. Hutton Company, Inc., concerning the purchase of stock options. Brown and E. F. Hutton had been handling certain financial affairs for the petitioner. A portion of these financial transactions included the completion of the sale of certain stock options and the

subsequent issuance of checks to the petitioner. On April 18, 1979, petitioner, Mr. Zerovnik, received a telephone call from respondent, Phyllis Benjamin, informing him that there had been an error, as the check sent to him had been wrongfully issued. Further, petitioner was informed that a stop-payment order had already been issued. After being told this over the telephone, he was put on indefinite hold. This entire event caused him difficulty in breathing and necessitated hospital care. Moreover, it caused him severe emotional and mental distress.

The basis for this appeal began when the trial court granted respondents' Motion for Summary Judgment on March 1, 1983 (App. 1). This ruling was based on its understanding of the law of the negligent infliction of emotional

distress prior to Schultz v. Barberton Glass Co., 4 Ohio St.3d 131, 447 N.E.2d 109 (1983).

Petitioner did not receive the customary notice of the judgment because of a clerical error. The error was due to the failure of a court clerk to place the necessary postage on the card sent to notify the parties of the judgment. Ultimately, the post card was re-issued on April 15, 1983 and reached Mr. Zerovnik's attorney on April 21, 1983. The petitioner subsequently filed his Motion for Relief From Judgment on July 1, 1983. In this motion, petitioner demonstrated that a clerical error committed by a clerk of the Court of Common Pleas, Cuyahoga County, prevented him from filing a timely Notice of Appeal, thereby violating his rights under the United States and Ohio Constitutions.

Petitioner Zerovnik alleged he was entitled to relief from judgment based upon two provisions of the Ohio Rules of Civil Procedure, as well as recent changes in Ohio law. First, he asserted that Ohio Rules of Civil Procedure 60(A) and 60(B) specifically apply to the instant case, and that mistake, inadvertence and other grounds, including clerical error, serve as the basis for relief from judgment. In support of this assertion, petitioner submitted the affidavits of James McNamara, John J. McCarthy and Barbara Wilkinson as attachments to his Motion for Relief From Judgment. Second, the petitioner alleged that he was entitled to relief from judgment based upon the recent case of Schultz v. Barberton Glass Co., 4 Ohio St.3d 131, 447 N.E.2d 109 (1983). Schultz, which definitively established

the right to sue for the negligent infliction of emotional distress, directly undercut the rationale of the Motion for Summary Judgment.

On August 11, 1983, respondents filed their Brief In Opposition, claiming there were insufficient grounds for relief under the Ohio Rules. The trial court granted petitioner's Motion For Relief From Judgment on August 10, 1983, thus vacating its February 28, 1983 order. The court held that "[d]ue to clerical error by the clerk of courts in furnishing notice to petitioner, the court's entry of February 28, 1983 is hereby vacated." (App. 2.) The court then simultaneously re-granted the Motion for Summary Judgment. (App. 3.) The respondent thereafter filed a Motion For Reconsideration on August 23, 1983. Petitioner responded by filing his Brief

in Opposition on August 24, 1983. The trial court never ruled on respondents' Motion for Reconsideration. On September 16, 1983, the respondents filed a cross-appeal claiming that the trial court erred in vacating its February 28, 1983 order. The Ohio Court of Appeals reversed and reinstated the original order. (App. 4.)

On August 15, 1984, petitioner filed a Memorandum In Support Of Jurisdiction to the Supreme Court of Ohio. Therein, petitioner contended that the Ohio Court of Appeals erred both in its application of state law, and more importantly, in its disregard of Federal Constitutional law. On October 3, 1984, the Ohio Supreme Court refused to hear the appeal and affirmed the ruling of the Court of Appeals.

* * * *

REASONS FOR GRANTING THE WRIT

1. Notice Adequate To Provide A Litigant With An Opportunity To Appeal Is Mandated By The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

In its decision, the Ohio Court of Appeals held that absent local rules to the contrary, there is no general right to notice of a trial court's ruling. (App. 11, 14.) It further held that Cuyahoga County Local Rule 19 (A) which provides, inter alia, that "notice of the filing of each journal entry or journalization shall, on the day following such filing, be published in the Daily Legal News," grants a party its only right to any notice. (App. 11-12.) That is, the Ohio Court of Appeals held that publication notice is the most that any party seeking appeal has a right to in Ohio. The Ohio Supreme Court, by virtue of its sua sponte dismissal,

upheld this decision. Such a holding is contrary to the Due Process Clause of the Fourteenth Amendment.

The right to notice of all judicial proceedings in which one has a legally protected interest is constitutionally mandated. See generally, Simon v. Craft, 182 U.S. 436 (1901); Schroeder v. City of New York, 371 U.S. 208, (1962); Genereux v. Pelosi, 96 R.I. 452, 192 A.2d 630 (1963); United States v. Steel Tank Barge H, 1651, 272 F.Supp. 658 (E.D. La. 1967). The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

It is an elementary and

fundamental requirement of due process that in any proceeding which is accorded finality, notice reasonably calculated to reach all interested parties should be provided. Milliken v. Meyer, 311 U.S. 457 (1940). Notice is a person's due, not a mere gesture, and the reasonableness and constitutionality of any notice can only be defended on the ground that it is reasonably certain to inform those affected. Hess v. Pawloski, 274 U.S. 352 (1927).

The right to notice has been specifically held to apply to the case of final judgments and final proceedings. In the seminal case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950), this Honorable Court held:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

The notice requirement has been held to be fundamental. In Schroeder v. City of New York, 371 U.S. 208, 212 (1962), this Honorable Court held that:

> [t]he requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process, the right to be heard.

Given this absolute constitutional mandate requiring notice, the holding of the Ohio Court of Appeals that, absent a local rule, no notice is required, is violative of due process and constitutionally erroneous. As the

preceding cases demonstrate, a party's right to notice of all judicial proceedings is constitutionally mandated.

Here, the right to appeal to the Ohio Court of Appeals was guaranteed. This right was denied. Petitioner never received timely notice of the final judgment against him. Thus, because petitioner was unable to file a timely appeal, he was denied an opportunity to acquiesce or contest. This was a deprivation of petitioner's right to appeal, an otherwise absolute right guaranteed under the laws of Ohio. See generally, Miller v. Bureau of Unemployment Compensation, 160 Ohio St. 561, 117 N.E.2d 427 (1954); Barger-Mitchell Motor Co. v. Levy, 34 Ohio App. 84, 170 N.E. 443 (Lucas Cty. 1929). While it might be argued that there is no inherent right to

appeal in civil cases, once the state creates that right, it must do so in a way which complies with the mandates of due process. Griffin v. Illinois, 351 U.S. 12 (1956). Therefore, petitioner was deprived of a fundamental protection of the judicial system: the right to a review by an appellate court of the decisions of a single judge. Such a protection is an integral part of due process of law under the concept of government of law rather than of men.

The Ohio Court of Appeals, pursuant to Local Rule 19 (A), held that publishing the judgment in the Daily Legal News constituteds adequate notice. Such a holding is clearly erroneous. Publication notice has long been held to be suspect, and is generally allowable only when it is not reasonably possible or practical to give more adequate

notice. Cunnius v. Redding School District, 198 U.S. 458 (1904). In Mullane, supra, this Honorable Court held that where the place of residence of the interested party is known, notice by publication is inadequate as a matter of law

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Id., 339 U.S. at 318. In discussing publication notice to known beneficiaries of a trust, this Court held that such notice is:

> [i]nadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former

> times, the mails today are recognized as an efficient and inexpensive means of communication.

Id., 339 U.S. at 319.

The cases holding publication notice as generally inadequate in virtually all situations are legion. See Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337 (1969); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983). In each and every case considered by this Honorable Court, publication notice has been held to be constitutionally inadequate when better means exist for informing litigants of their rights.

In accordance with this Court's holding in Mullane, supra, state supreme courts have held state statutes which provide for notice by publication

unconstitutional. These cases include: Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1979); and Baggett v. Baggett, 541 S.W.2d 407 (Tenn. 1976). A similar result has been reached by a federal court interpreting Ohio law. See Harris v. Gaul, 572 F.Supp. 1554 (N.D. Ohio 1983).

It is uncontested that neither petitioner, Mr. Zerovnik, nor his attorneys had ever received timely notice of the original judgment. The only notice, then, came by publication, and that publication did not even state the names of the law firms involved in the litigation.

> Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication.

City of New York v. New York N.H. & H.R. Co., 344 U.S. 293, 296 (1953). Here, the substitution was poor indeed. The fact that the attorneys of record were not even listed in the publication made discovery of the judgment more a sporting proposition than a vehicle for justice. That a clerk normally mails a postcard is indicative of the fact that the local bench and bar do not believe such an ethereal method as partial publication to be adequate. Obviously, if the local courts felt that notice solely by publication was likely to reach all interested parties, the courts would never have adhered to the standard policy of sending postcard notice.

Moreover, the customary postcard notice is evidence of the feasibility of an alternate and far superior method of

notifying litigants of judgments. This Honorable Court has held that tokenism in giving notice is not enough. Rather, the "means employed in giving notice must be such as one desirous of actually informing persons to be notified might reasonably adopt to accomplish that purpose." Mullane v. Central Hanover Bank & Trust Company, at 315.

Finally, although not formally incorporated in the rules, notice by postcard is required by custom of the local bar. Such custom, relied upon by local counsel, was not followed. This alone furnishes a reason for overturning the holding of the Ohio Court of Appeals. It has long been recognized that failure of a court to give the notice required by custom serves as a ground for setting aside or vacating a default judgment. See Lynch v. Betts, 198 Cal. App.2d 755,

18 Cal. Rptr. 345 (1962); Lunt v. Van Gorden, 225 Iowa 1120, 281 N.W. 743 (1938); Curran v. James Regulator Co., 154 Pa. Super. 261, 36 A.2d 187 (1944); Flynn v. Silvers, 389 Pa. 142, 132 A.2d 180 (1957); Peaslee-Gaulbert Corp. v. Hughes, 79 S.W.2d 149 (Tex. App. 1934). The basis for procedural due process protection, which requires that relied-upon notice be given in default cases, applies equally here: legal rights only have life if they are known.

Thus, under the constitutional mandates of Mullane, supra, and subsequent cases, publication should not serve to deny a litigant his right to appeal. Notice by mail is both inexpensive and sure, while publication notice can and is easily missed by those whose rights are affected. Therefore, petitioner asserts that his right to due

process has been denied by the ruling of the Ohio Court of Appeals.

* * * *

2. When A Litigating Party Is Deprived of Notice, The Fourteenth Amendment To The United States Constitution Mandates a Remedy.

As was demonstrated in Section "1" above, every party to a legal action has a right to notice of judgments against him. This right, though mandated by the Fourteenth Amendment, only has meaning if there exists a concomitant remedy. Under the ruling of the Ohio Court of Appeals, undisturbed by the Ohio Supreme Court, no such remedy exists. This ruling conflicts both with the right to procedural due process notice and with the right to open access to the courts.

a. Deprivation of a litigant's right to notice is violative of procedural due process.

In the state courts of Ohio, two possible remedies exist for a party faced with an adverse final judgment by a trial court: a direct appeal or a motion for relief from judgment. Under Ohio Rule of

Appellate Procedure 4(A), any direct appeal must be filed within thirty (30) days of the date of the entry of the original judgment. This time period has long been held to be jurisdictional, and generally not extendable. See generally Kauder v. Kauder, 38 Ohio St.2d 265, 313 N.E.2d 797 (1974); Bosco v. Euclid, 38 Ohio App. 2d 40, 311 N.E.2d 870 (Cuyahoga Cty. 1974).

The other possible remedy, and the one the petitioner, Mr. Zerovnik, pursued, is a motion for relief from judgment pursuant to Ohio Rule of Civil Procedure 60. Rule 60 is relevant in two ways. First, under Rule 60(A), when there is a clerical error, relief may be granted. Second, under Rule 60(B)(5), when there exist sufficient grounds for relief from judgment and those grounds have not previously been enumerated, relief may be granted.

In its opinion, the Ohio Court of Appeals refused to apply Rule 60. The court dictated three bars to any relief under the rule. First, according to the court, although a clerical error existed, Rule 60(A) does not authorize relief from judgment. The proper method for seeking relief from a judgment is through Rule 60(B). Second, it held that Rule 60(B) relief is not warranted unless a specific local court rule regarding notice, assuming one exists, is violated. No mention of constitutional violations was made. Finally, the court held that, even assuming that a notice violation occurred, two-and-one-half months is too long a delay for initiating a Motion for Relief. (App. 16.) Certainly, each of these holdings is sufficient to constitute a violation of petitioner's right to due process. However, taken

together, they effectively and egregiously block any remedy that petitioner might have, thereby depriving him of his right to relief.

Contrary to the Ohio Court of Appeals decision, Rule 60(A), which provides for relief from clerical errors, is applicable. In fact, that is the very title given the rule. Originally, petitioner did not receive his timely notice due to the failure of a clerk to affix postage to the postcard. This failure was admitted to be an error by the clerk in his affidavit. Nevertheless, despite this circumstance being "clerical error," thus squarely within the language of the rule, the Ohio Court of Appeals held that Rule 60(A) does not apply because Rule 60(B) "is the obvious rule of choice, rather than Civil Rule 60(A)." (App. 10.) Thus, a remedy

to a constitutional right is demolished because of the court's prim ideas of preference.

However, once striking Rule 60(A), the court eliminated the application of the "rule of choice" also. The Ohio Court of Appeals held that because actual notice is not required, the failure to give customary notice does not serve as a proper ground for allowing relief from judgment. Prior to this decision, the law of Ohio was that the area of relief from judgments was strictly within the sound discretion of the trial court. Tucci v. Toomey, 142 N.E.2d 669, 670 (Ohio Mahoning Cty. 1955). Once made, a decision by the trial court would not be disturbed absent proof of gross abuse of discretion. Steadley v. Montanya, 67 Ohio St.2d 297, 423 N.E.2d 851 (1981); Wilson v. Wilson, 14 Ohio App.2d 148, 237

N.E.2d 421 (Cuyahoga Cty. 1968); Miller v. Wilkinson, 202 N.E.2d 319 (Ohio Ashtabula Cty. 1963).

The trial court had determined that the failure to receive timely notice constituted sufficient grounds for granting relief. However, the Court of Appeals struck down the decision, stating, in essence, that action violative of due process was not a legitimate reason to justify granting relief from judgment. That is, the appellate court held that, as a matter of law, the denial of due process was not an "other reason justifying relief from the judgment" in accordance with Rule 60(B). Certainly, there was no justification under the existing state law of Ohio for the Court of Appeals to make such a dramatic and anti-due process ruling.

The Ohio Supreme Court in Steadley

v. Montanya, 57 Ohio St.2d 297, 423 N.E.2d 851 (1981), held that a reasonable reliance can serve as a basis for relief from judgment. The Supreme Court further held in Steadley that:

> The failure of the court to give notice of a judgment is the basis for finding that the Motion For Relief From Judgment, pursuant to Civil Rule 60(B) was timely.

Id. at 299, 423 N.E.2d at 854. However, even if the Ohio Court of Appeals' opinion was mandated under state law, such law would be contrary to the notice requirements under the Due Process Clause of the United States Constitution. See Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950); Schroeder v. City of New York, 371 U.S. 208 (1962).

Finally, the Ohio Court of Appeals, in a novel and arbitrary holding, stated that a two-and-one-half

month delay between petitioner's discovery of the final judgment and his filing of a motion for relief from that judgment was unreasonable. By so doing, the Court of Appeals effectively rewrote the Civil Rules and reversed all prior case law in its blanket attempt to dismiss petitioner's appeal. Such a holding has no basis in Ohio law.

Rule 60(A), although offhandedly rejected by the Court of Appeals, does not impose any time limitations upon a party. Rather, it provides that a clerical error "may be corrected by the court at any time on its own initiative or on the motion of any party." (Emphasis added.) Therefore, as applied to Rule 60(A), there is no basis to support a holding that a period of two-and-one-half months is unreasonable as a matter of law.

Under Rule 60(B)(5), relief may be granted "within a reasonable time" and "not more than one year after the judgment." Certainly, the one-year limit was not exceeded. Therefore, and more importantly, the appellate court decision rests entirely on a determination of "reasonableness." Under Ohio law, the question of what is reasonable is left entirely within the discretion of the trial court, which has the ability to judge the steps that would be needed and thus reasonable in compiling a motion and brief under Rule 60. Here, petitioner submitted a motion, a substantial brief, and three affidavits. Certainly, the effort needed to research thoroughly the issues involved, and compile the relevant affidavits were not so ephemeral that the trial court's determination could be

considered to be unreasonable as a matter of law.

There is no authority whatsoever for the Ohio Court of Appeals' sudden decision that seventy-one (71) days is too long a period in which to file a motion for relief from judgment. As the dissent cogently pointed out, "the delay was only two-and-one-half months. . . . Considering the circumstances, a two-and-one-half month delay is certainly reasonable." (App. 23-24.) In fact, the case law in Ohio clearly indicates that such a time period is not only reasonable, but that it would be error for a trial court to say that it is unreasonable. See generally, Doddridge v. Fitzpatrick, 53 Ohio St.2d 9, 371 N.E.2d 214 (1978); Coulson v. Coulson, 5 Ohio St.3d 12, 448 N.E.2d 809 (1983); Svoboda v. Brunswick, 6 Ohio

St.3d 348, 453 N.E.2d 648 (1983); Antonopoulous v. Eisner, 30 Ohio App.2d 187, 284 N.E.2d 194 (Cuyahoga Cty. 1972); In re Murphy, 10 Ohio App.3d 134, 461 N.E.2d 910 (Hamilton Cty. 1983).

Thus, the Ohio Court of Appeals went to great lengths to deny a proper remedy to petitioner, Mr. Zerovnik. It effectively rewrote Rule 60(A) so as not to have a clerical error mean "a clerical error;" it changed the meaning of Rule 60(B)(5) so that a constitutional deprivation does not constitute a good cause for relief; it eradicated the abuse of discretion standard and substituted its own judgment as to the facts; it announced for the first time in the history of Ohio jurisprudence that seventy-one (71) days was too long a

period for the filing of a motion and brief as a matter of law; it refused to apply the clear language of Rule 60(A) which allows a court to correct its own errors at any time; and it changed the case law in mid-litigation to the detriment of a party who relied upon the law to protect his constitutionally mandated rights.

Given this ruling by the Ohio Court of Appeals, upheld by the Ohio Supreme Court by its refusal to hear an appeal, there can be no doubt that petitioner Mr. Zerovnik's right to a remedy of his constitutional deprivation has been denied.

b. Deprivation of a litigant's right to notice effectively bars his right to open access to the courts.

Every citizen is guaranteed full and open access to the courts. Johnson

v. Avery, 393 U.S. 483 (1969); United States ex rel. Mayberry v. Prasse, 225 F. Supp. 752 (E.D. Pa 1963). This guarantee is mandated by the Due Process Clause of the Fourteenth Amendment. Hymes v. Dickson, 232 F. Supp. 796 (N.D. Cal. 1964). Open access means that no party may be arbitrarily shut off from those remedies the judicial system normally provides.

Certainly, some limitations on open access are constitutionally permissible. However, though some limitations are generally allowed, they can not be used to deprive a litigant of his day in court. See generally, Logan v. Zimmerman Brush Co., 455 U.S. 422, (1982); Boddie v. Connecticut, 401 U.S. 371 (1971). In Ohio, Rule 4(A) of the Rules of Appellate Procedure, provides that a potential appellant has thirty days in which to file his notice of

appeal. This thirty day period commences on the day the entry of a judgment or order is filed, not on the day the parties receive actual notice of the judgment. Therefore, it is conceivable that a litigant may be prevented from pursuing an appeal through no fault of his own, where he failed to receive notice of a judgment or order and was thereby precluded from timely filing his notice of appeal. Such action would bar his entry into the courts. This is exactly what happened to petitioner, Mr. Zerovnik.

Reasonable access to the courts, both state and federal, is guaranteed by the Due Process Clause of the Fourteenth Amendment. See generally, DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966); Hymes v. Dickson, 232 F.Supp. 796 (D.C. Cal. 1964); United States ex rel

Mayberry v. Prasse, 225 F.Supp. 752 (E.D. Pa. 1963). Nowhere, among the voluminous cases interpreting the Due Process Clause is the right to reasonable access to the courts limited solely to the trial court level. Therefore, concomitant remedies must exist for such a situation. In Ohio, such remedies are exemplified in Ohio Civil Rule 60. However, the mere existence of such remedy is insufficient, it must be applied to be effective.

Through its actions, the Ohio Court of Appeals has not only summarily disposed of any remedy, but has further eliminated the right to access in the appellate courts, thereby flagrantly disregarding the Due Process Clause of the Fourteenth Amendment.

The limitations imposed through the appellant rules for a timely filing of a notice of appeal are obviously

designed to prevent unduly prolonged litigation. However, the rule is not meant to be an unjust form of punishment for a litigant, as it has been applied in this case. The appellate system is designed, in part, as a means to prevent a litigant from being penalized for the mistakes or errors of a trial court. However, the present case illustrates not only the penalization of a litigant, but the flagrant violation of due process rights when the right to open access of the courts is ignored.

Petitioner, Mr. Zerovnik, was, by virtue of a clerical error, denied his right to appeal and his access to the courts. He is, in essence, not only being penalized for a clerical error, but is further being stripped of a fundamental right. Therefore, the Ohio Court of Appeals' holding, which for all

purposes eliminates the right to open access of the courts provided by the Fourteenth Amendment, should not be permitted. The Ohio Supreme Court, by virtue of the sua sponte dismissal, not only refused to consider the constitutional violations, but implicitly sanctioned the actions of the appellate court. This case is but one instance of the potential abuses and deprivations when a state system is allowed to not only ignore applicable constitutional provisions, but further to prevent their application.

* * * *

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

Joel Levin, Esq.

700 Engineers Building
Cleveland, Ohio 44114-1357
216/621-2300

Counsel for Petitioner

December 31, 1984

A P P E N D I X

CASE NO. 18863

ASSNG. JUDGE D. CORRIGAN

PAUL R. ZEROVNIK VS. E. F. HUTTON CO., et al.

MOTION: Deft. Grt'd. for Summary Judgmt. 5/21/82

FINAL

JOURNAL: 2/28/83 - Defendants' Joint Motion for Summary Judgment is granted; Judgment for defendants, at plaintiff's costs. (Signed) Daniel Corrigan, Judge.

Clerk of Courts Received for Filing Mar 1 1983 Gerald E. Fuerst, Clerk by A. Aber, Dep. Vol 642 Pg 613

The State of Ohio) I, Gerald E. Fuerst,
) § Clerk of the Court
Cuyahoga County) of Common Pleas,
within and for said

county, hereby certify that the above and foregoing is truly taken and copied from the original Vol 642 Pg 613 dated March 1, 1983 now on file in my office.

Witness my hand and seal of said court this 9th day of August, A.D. 1983.

Gerald E. Fuerst, Clerk
(signed) By Eileen Demas, Deputy

CASE NO. 18863

ASSNG. JUDGE D. CORRIGAN

PAUL R. ZEROVNIK VS. E. F. HUTTON & CO., et al.

POST CARD

JOURNAL: 7/7/83 - Due to clerical error by the clerk of courts in furnishing notice to plaintiff, the court's entry of Feb. 28, 1983 is hereby vacated. (Signed) Daniel Corrigan, Judge.

Clerk of Courts Received for Filing Aug 10 1983 Gerald E. Fuerst, Clerk by E. Demas, Dep. Vol 670 Pg 729

The State of Ohio) I, Gerald E. Fuerst,
) § Clerk of the Court
Cuyahoga County) of Common Pleas,
within and for said

county, hereby certify that the above and foregoing is truly taken and copied from the original Vol 670 Pg 729 dated August 10 1983 now on file in my office.

Witness my hand and seal of said court this 19th day of August, A.D. 1983.

Gerald E. Fuerst, Clerk
(signed) By Eileen Demas Deputy

CASE NO. 18863

ASSNG. JUDGE D. CORRIGAN

PAUL R. ZEROVNIK VS. E. F. HUTTON & CO., et al.

MOTION: Deft. Grt'd. for Summary Judgment. 5/21/82

FINAL POST CARD

JOURNAL: 7/7/83 - Defendants' Joint Motion for Summary Judgment is hereby granted; Judgment for defendants, at plaintiff's costs.
(Signed) Daniel Corrigan, Judge.

Clerk of Courts Received for Filing Aug 10 1983 Gerald E. Fuerst, Clerk by E. Demas, Dep. Book 670 Page 730

The State of Ohio)
) §
Cuyahoga County)

I, Gerald E. Fuerst, Clerk of the Court of Common Pleas, within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original Book 670 Page 730 dated August 10 1983 now on file in my office. Witness my hand and seal of said court this 19th day of August, A.D. 1983.

Gerald E. Fuerst, Clerk
(signed) By Eileen Demas Deputy

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 47460

PAUL R. ZEROVNIK,	:	
	:	
Plaintiff-Appellant-	:	
Cross-Appellee	:	
	:	
-vs-	:	JOURNAL ENTRY
	:	and
E. F. HUTTON AND	:	OPINION
COMPANY, INC., ET AL.,	:	
	:	
Defendants-Appellees-	:	
Cross-Appellants	:	

DATE OF ANNOUNCEMENT
OF DECISION:

CHARACTER OF PROCEEDING: Civil Appeals from Common Pleas Court Case No. 018,863

JUDGMENT: Appellant's appeal dismissed; judgment of the trial court granting appellant's motion for relief from judgment is reversed; judgment reinstated in favor of cross-appellants.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiff-Appellant:

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For Defendants-Appellees:

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Ulmer, Berne, Laronge, Glickman
& Curtis
900 Bond Court Building
Cleveland, Ohio 44114

NAHRA, J.:

This is an appeal and cross-appeal from the Cuyahoga County Court of Common Pleas. Appellant, Paul R. Zerovnik, contests the trial court's order granting summary judgment in favor of appellees, E.F. Hutton and Company, Inc., Phyllis Benjamin and Richard Brown. Appellees have cross-appealed contesting the trial court's order granting appellant's motion for relief from judgment. We reverse the judgment of the trial court granting appellant's motion for relief from judgment, thereby reinstating the original judgment, and we dismiss appellant's appeal for lack of jurisdiction.

On October 16, 1980, appellant brought suit against appellees alleging that Phyllis Benjamin negligently reported to him that due to an error in E.F. Hutton's accounting system, a stop payment order had

been placed on a check previously issued to him. As a result, appellant alleged that he became emotionally distraught, which led to an irregular heartbeat requiring hospitalization.

Following discovery, on May 21, 1982, appellees jointly moved for summary judgment attaching the affidavits of appellees Richard Brown and Phyllis Benjamin and the deposition of appellant. On August 9, 1982, appellant responded with a brief in opposition. The trial court rendered judgment in appellees' favor on March 1, 1983.

On July 1, 1983, appellant filed a motion for relief from judgment with evidentiary material pursuant to Civ. R. 60(A) and 60(B)(5). He first alleged that he did not timely receive a postcard from the clerk of court notifying him of the court's March 1, 1983 ruling. As a second ground for relief, appellant alleged that

there had been a change in case law[1] favorable to him since the trial court's judgment against him. Appellant urged the trial court to vacate its earlier judgment and either enter an order denying appellees' motion for summary judgment or re-enter an order granting appellees' motion for summary judgment so that a timely appeal could be filed.

On July 6, 1983, the parties stipulated that appellees had until August 11, 1983, to respond to appellant's motion for relief from judgment. The trial court, however, on August 10, 1983,[2] vacated its earlier

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1 On April 13, 1983, the Supreme Court of Ohio held that a cause of action existed for the negligent infliction of serious emotional distress without a contemporaneous physical injury. Schultz v. Barberton Glass Co. (1983), 4 Ohio St. 3d 131 (Syl.).

2 Since cross-appellants have not raised this occurrence as an assignment of error, and since resolution of this occurrence is unnecessary to the disposition of the present appeals based upon the record before us, we need not address the propriety of the trial court's action.

judgment due to a clerical error by the clerk of court in furnishing notice to appellant. The trial court then re-entered its earlier judgment granting appellees' summary judgment motion. On August 11, 1983, appellees filed a brief in opposition to appellant's motion for relief from judgment and attached evidentiary material.

Both parties appealed. We will address the assignments of error of the cross-appeal first.

I.

Cross-appellants' first assignment of error is that:

> THE TRIAL COURT ERRED IN VACATING A JUDGMENT UNDER THE PURPORTED AUTHORITY OF CIVIL RULE 60(A), WHICH RULE AUTHORIZES ONLY THE CORRECTION OF CLERICAL MISTAKES AS OPPOSED TO SUBSTANTIVE CHANGES IN JUDGMENTS.

The proper vehicle in which to allege the failure to receive proper notice of a court's ruling is Civ. R. 60(B)(5). State,

ex rel. Pajestka, v. Faulhaber (1977), 50 Ohio St. 2d 41. Further, when a party institutes procedures for vacating a judgment, Civ. R. 60(B) is the obvious rule of choice, rather than Civ. R. 60(A). Musca v. Chagrin Falls (1981), 3 Ohio App. 3d 192. Pursuant to these authorities, cross-appellee's and the trial court's reliance upon Civ. R. 60(A) to vacate a judgment for the failure to receive notice was error. Cross-appellants' first assignment of error is sustained.

II.

Cross-appellants' second assignment of error is that:

> THE TRIAL COURT ERRED IN VACATING A JUDGMENT UNDER THE PURPORTED AUTHORITY OF CIVIL RULE 60(B) FOR THE ALLEGED FAILURE TO RECEIVE A NON-MANDATORY POSTCARD FROM THE CLERK OF COURTS, WHERE THE ORIGINAL ENTRY WAS PROPERLY JOURNALIZED AND APPEARED IN THE DAILY LEGAL NEWS.

A motion for relief from judgment filed

pursuant to Civ. R. 60(B)(5) is the appropriate method for requesting the vacation of a judgment for the failure to receive proper notice of a court's ruling. State, ex rel. Pajestka v. Faulhaber (1977), 50 Ohio St. 2d 41 (emphasis added). Unless local rules specifically provide otherwise, "no provision in Ohio law or rule of civil or appellate procedure requires that a party be given actual notice of the filing of a judgment entry." Americare Corp. v. Misenko (1984), 10 Ohio St. 3d 132; see Kiss v. Allstate Insurance Co. (1983), 10 Ohio App. 3d 238; Town & Country Drive-In Shopping Centers Inc. v. Abraham (1975), 46 Ohio App. 2d 262.

The local rules of the Court of Common Pleas in Cuyahoga County do provide for a method of notice to parties of the court's rulings. Rule 19 provides, in relevant part, that "notice of the filing of each journal entry for journalization shall, on

the day following such filing, be published in the Daily Legal News." Cuyahoga County Ct. C.P. R. 19(A); see id. R. 14. Publication of a final judgment in the Daily Legal News is sufficient notification of the trial court's action. Ridge Road Investment Co. v. Esch Construction Co., No. 41268 (8th Dist. Ct. App. May 22, 1980); Glass v. Mayfield Village Racquet Club, No. 38112 (8th Dist. Ct. App. Dec. 28, 1978); see Bosco v. Euclid (1974), 38 Ohio App. 2d 40. Even if a postcard is customarily mailed to counsel indicating the date of a ruling by the court, the court's ruling is effective only when filed with the clerk for journalization. See Ohio R. Civ. P. 58.

The burden is on the parties to follow the progress of their own case. Maynard v. Maynard, No. 43642 (8th Dist. Ct. App. Feb. 11, 1982); Grays v. Board of Zoning Appeals, No. 40239 (8th Dist. Ct. App. Apr. 10, 1980). A party's failure to be aware of a

properly journalized and published judgment does not justify vacation of that judgment pursuant to Civ. R. 60(B). See Bosco v. Euclid (1974), 38 Ohio App. 2d 40; Maynard v. Maynard, No. 43642 (8th Dist. Ct. App. Feb. 11, 1982); Haase v. Haase, No. 42726 (8th Dist. Ct. App. Mar. 12, 1981); National Broadcasting Company v. Board of Review, Nos. 41345-46 (8th Dist. Ct. App. May 30, 1980); Grays v. Board of Zoning Appeals, No. 40239 (8th Dist. Ct. App. Apr. 10, 1980). A party who relies solely on local customs, such as the mailing of a notice, rather than the procedure set out by either the Ohio Rules of Civil Procedure or the local rules of court, does so at his own peril. Glass v. Mayfield Village Racquet Club, No. 38112 (8th Dist. Ct. App. Dec. 28, 1978).

Civil Rule 60(B)(5) relief is warranted, provided proper compliance with Civ. R. 60(B), when the trial court fails to properly publish notice of its journal entry

pursuant to Local Rule 19(A). Erlechman v. Diamond, No. 39852 (8th Dist. Ct. App. Jan. 17, 1980); see Steadley v. Montanya (1981), 67 Ohio St. 2d 297; Society National Bank v. Joyce, No. 44431 (8th Dist. Ct. App. Oct. 28, 1982). The final judgment in this case was published in the Daily Legal News on March 2, 1983.[3] Therefore, the failure to receive a postcard from the clerk's office advising of the court's ruling, even if never dispatched, is irrelevant to our disposition of this assignment of error in light of the law set forth above on this issue. Civil Rule 60(B) relief is not warranted if the court properly complies with its local rules. Moreover, absent the Cuyahoga County local rule, no notice at all is required regarding a court's ruling. See

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3. The fact that counsel's name is not published is not controlling. It is the case number and case name that is significant.

Americare Corp. v. Misenko (1984), 10 Ohio St. 3d 132; Kiss v. Allstate Insurance Co. (1983), 10 Ohio App. 3d 238; Town & Country Drive-In Shopping Centers Inc. v. Abraham (1975), 46 Ohio App. 2d 262. Accordingly, cross-appellants' second assignment of error is sustained.

III.

Cross-appellants' last assignment of error is that:

> THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT, WHEN THE SAME WAS NOT FILED WITHIN A REASONABLE TIME AS REQUIRED BY CIVIL RULE 60(B).

The Supreme Court of Ohio has set forth three requirements which must be demonstrated by a moving party in order to prevail on a Rule 60(B) motion:

> (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time . . . .

GTE Automatic Electric v. ARC Industries (1976), 47 Ohio St. 2d 146 (Syl. 2). The third requirement necessitates a showing by evidentiary material that the motion to vacate was made within a reasonable time. See Security Insurance Co. v. Regional Transit Authority (1982), 4 Ohio App. 3d 24, 26.

Even assuming that cross-appellee's argument regarding customary notice is well-taken, cross-appellee received a postcard from the clerk's office on April 19, 1983, notifying him of the court's adverse ruling, according to the affidavit of James McNamara. Yet no action was taken until July 1, 1983, when cross-appellee filed his motion for relief from judgment. Under the circumstances, a two and one-half month delay is not reasonable. Moreover, no explanation, evidentiary or otherwise, was given for waiting until July to file for relief.

Further, even if cross-appellee's delay is considered reasonable, no grounds exist in Civ. R. 60(B)(1)-(5) for the granting of relief. In addition to cross-appellee's argument regarding his alleged lack of notice, which we have rejected, cross-appellee urged that the change in law in his favor since judgment was entered against him warranted relief under Civ. R. 60(B)(5).

Although a novel argument in Ohio since the enactment of the civil rules,[4] we conclude that precedential evolution which constitutes a change in judicial law after a

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4 Prior to the civil rules when the trial courts retained jurisdiction over cases according to terms of court, it was reversible error to deny a motion to vacate filed during the same term of court due to a change in the law which occurred during that same term of court. Clark v. Iles (1965), 10 Ohio App. 2d 135; see generally Cale Products, Inc. v. Orrville Bronze & Alum. Co. (1982), 8 Ohio App. 3d 375.

final judgment has been entered and unpursued on appeal is not a sufficient basis for vacating a judgment entered prior to the announcement of said change. Accord Ackermann v. United States (1950), 340 U.S. 193;[5] National Labor Relations Board v. Koenig Iron Works, Inc. (2d Cir. 1982), 681 F.2d 130; Carter v. Romines (8th Cir. 1979), 593 F.2d 823; DeFilippis v. United States (7th Cir. 1977), 567 F.2d 341; Lubben v. Selective Service System Local Board No. 27 (1st Cir. 1972), 453 F.2d 645; Collins v. City of Wichita, Kansas (10th Cir. 1958), 254 F.2d 837; Berryhill v. United States (6th Cir. 1952), 199 F.2d 217; Loucke v. United States (S.D.N.Y. 1957), 21 F.R.D. 305; contra Equal Employment Opportunity Commission v. Baltimore & Ohio Railroad Company (D. Md. 1983), 557 F. Supp. 1112.

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5 Fed. R. Civ. P. 60(b)(6) is essentially identical to Ohio R. Civ. P. 60(B)(5).

Litigation must end at some time. Ackermann v. United States, 340 U.S. at 198; National Labor Relations Board v. Koenig Iron Works, 681 F.2d at 147; Collins v. Wichita, Kansas 254 F.2d at 839; see Bosco v. Euclid (1974), 38 Ohio App. 2d 40. If we were to hold otherwise, any adverse judgment previously rendered could be vacated and reopened to apply the new law. For example, the sovereign immunity of counties for certain actions was recently abolished in Ohio. Zents v. Board of Commissioners (1984), 9 Ohio St.3d 204. If we adopt cross-appellee's argument, all prior judgments rendered in favor of counties based upon the defense of sovereign immunity should now be vacated upon application pursuant to Civ. R. 60(B)(5). Such a result would render the finality of judgments meaningless.

For all of the above reasons, cross-appellants' third assignment of error

is sustained.

IV.

Appellant's sole assignment of error is that:

> THE TRIAL COURT ERRED IN GRANTING THE JOINT MOTION FOR SUMMARY JUDGMENT OF THE DEFENDANTS SINCE GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE DEFENDANTS' LIABILITY AND DEFENDANTS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Based upon our disposition of cross-appellants' assignments of error, since no notice of appeal was filed with the clerk of the trial court within thirty days of the date of entry of judgment, i.e., March 1, 1983, as required by Ohio R. App. P. 4(A), we are without jurisdiction to consider the merits of appellant's appeal.

Appellant's appeal is hereby dismissed, the judgment of the trial court granting appellant's motion for relief from judgment is reversed, and judgment is hereby reinstated in favor of cross-appellants.

Received for filing Jun 7 1984
Gerald E. Fuerst, Clerk
By (initialed) JB Dep.

Appellant's cause is dismissed; judgment of the trial court granting appellant's motion for relief from judgment is reversed; and judgment reinstated in favor of cross-appellants.

It is, therefore, considered that said cross-appellant(s) recover of said cross-appellee their costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

JACKSON, P.J., CONCURS.

PRYATEL, J., CONCURS IN PART AND DISSENTS IN PART (See Concurring and Dissenting Opinion attached.)

Judge
(signed) Joseph J. Nahra

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 47460

PAUL R. ZEROVNIK	:	
	:	
Plaintiff-Appellant-Cross-Appellee	:	
	:	
vs.-	:	CONCURRING AND
	:	
E. F. HUTTON AND COMPANY, INC., ET AL.	:	DISSENTING OPINION
	:	
Defendants-Appellees-Cross-Appellants	:	

PRYATEL, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the ruling affirming the first order for summary judgment (dated March 1, 1983) and that appellant did not timely file an appeal from that order.

However, I disagree with the majority opinion that a two and a half month delay in filing a motion to vacate is unreasonable in this case. A motion to vacate must be

brought within a reasonable length of time, which may be more or less than a year depending on the circumstances. Mount Olive Baptist Church v. Pipkins Paints (1979), 64 Ohio St. 2d 285, 288. See also, Adomeit v. Baltimore (1974), 39 Ohio App. 2d 97, 106.

In both of those cases, a period of less than one year was found to be unreasonable. However, in Mount Olive the delay was seven months. Furthermore, there was evidence that the movant had willfully delayed responding to the original complaint by throwing it into the wastebasket. In Adomeit, the delay was five months. Also, in both Adomeit and Mount Olive, the movants had not responded to the complaints and thus they were moving to vacate default judgments. Their delays in filing such motions were not the first indication that those parties were not diligently pursuing their claims. In the present case, the delay was only two and

a half months. Appellant competently pursued a potentially complicated and emotionally stressful lawsuit up until that time. Appellant had alleged that he suffered heart problems after appellee informed him that they were stopping payment on a check for over $2,000 made out to appellant. Considering the circumstances, a two and a half month delay is certainly reasonable.

I therefore respectfully dissent from the majority opinion on that issue only.

THE SUPREME COURT OF OHIO

COLUMBUS

1984 Term

To Wit: October 3, 1984

Paul R. Zerovnik, Appellant,	:	Case No. 84-1225
v.	:	APPEAL FROM THE COURT OF APPEALS
E. F. Hutton et al., Appellees.	:	for Cuyahoga County

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

FRANK D. CELEBREZZE
Chief Justice

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

_____CLERK

_____DEPUTY

THE SUPREME COURT OF OHIO

COLUMBUS

1984 Term

To Wit: October 3, 1984

Paul R. Zerovnik, Appellant,	:	
	:	Case No. 84-1225
v.	:	MOTION FOR AN ORDER DIRECTING
E. F. Hutton et al., Appellees.	:	THE COURT OF APPEALS
		for Cuyahoga County
		to CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Nurenburg, Plevin, Jacobson, Heller and McCarthy.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

_____CLERK

_____DEPUTY

(2)

Office Supreme Court, U.S.
FILED
JAN 29 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1056

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PAUL R. ZEROVNIK

Petitioner,

v.

E. F. HUTTON AND CO., INC.,
RICHARD BROWN AND PHYLLIS BENJAMIN

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRUCE P. MANDEL, ESQ.
ULMER, BERNE, LARONGE,
GLICKMAN & CURTIS
900 Bond Court Building
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216/621-8400

Counsel for Respondents

January 29, 1985

No. 84-1056

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PAUL R. ZEROVNIK

Petitioner,

v.

E. F. HUTTON AND CO., INC.,
RICHARD BROWN AND PHYLLIS BENJAMIN

Respondents.

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Counsel for Respondents

January 29, 1985

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OHIO RULE OF APPELLATE PROCEDURE 4(A)

APPEAL AS OF RIGHT - WHEN TAKEN

(A) Appeals in civil cases. In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed before entry of such judgment or order shall be treated as filed after such entry and on the day thereof. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the trial court by any party pursuant to the Civil Rules hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of the last of any of the following orders made upon a timely motion under such rules granting or denying a motion (1) for judgment under Rule 50(B); (2) for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

OHIO RULE OF CIVIL PROCEDURE 58

ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(B), upon a general verdict of a jury, or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs.

Amended July 1, 1971.

CUYAHOGA COUNTY COMMON PLEAS COURT
RULE 19(A)

JOURNAL ENTRIES

(A) When ordered or directed by the court, counsel for the party in whose favor a calendar entry, order, judgment or decree is entered in a cause in Civil or Domestic Relations Divisions shall, within ten (10) days thereafter unless the time be extended by the court, prepare a proper journal entry and submit the same to counsel for the opposite party who shall approve or reject the same within three (3) days after its receipt by him and may, in case of rejection, file objections thereto in writing with the court.

The judgment entry specified in Ohio Civil Rule 58 shall be journalized within thirty (30) days of the verdict, decree or decision. If such entry is not prepared and presented for

journalization by counsel, then it shall be prepared and journalized by the court.

In all cases where a final title report is required, the above mentioned (10) days relative to journal entries shall commence from the date the final title report is filed.

The court shall approve a journal entry deemed by it to be proper, sign the same and cause it to be filed with the Clerk, and notice of the filing of each journal entry for journalization shall, on the day following such filing, be published in the Daily Legal News.

FEDERAL RULE OF CIVIL PROCEDURE 77(d)

DISTRICT COURTS AND CLERKS

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in

Rule 4(A) of the Federal Rules of Appellate Procedure.

OHIO RULES OF CIVIL PROCEDURE 60(A)

RELIEF FROM JUDGMENT OR ORDER

(A) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

OHIO RULE OF CIVIL PROCEDURE 60(B)

RELIEF FROM JUDGMENT OR ORDER

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it

is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

COUNTER-STATEMENT OF THE CASE

Petitioner filed this lawsuit against E. F. Hutton and Company, Inc., Richard Brown, and Phyllis Benjamin (hereinafter "respondents") alleging negligent conduct by the respondents, on or about April 10, 1979, in reporting to petitioner that certain checks, concerning the sale of stock options, had been erroneously issued to him and would be reissued in the correct amounts. Petitioner alleges that as a result, he became mentally distraught, which led to an irregular heart beat requiring hospitalization.

Respondents thereafter filed a Joint Motion for Summary Judgment. Respondents urged, in their Motion, two independent bases mandating judgment as a matter of law, namely (1) that their actions failed to demonstrate the requisite willful or malicious conduct necessary, under existing Ohio law, as

a condition precedent for claims of emotional distress (Miller v. B & O Southwestern Railroad Company, 78 Ohio St. 309 (1908)), and (2) that, in any case, petitioner's purported injury was not reasonably foreseeable, one of the key elements of any negligence claim. Person v. Gum, 7 Ohio App.3d 307 (Cuy. App. 1983); Weisser v. Otter Tail Power Co., 318 F.2d 375, 377 (8th Cir. 1963). The trial court granted respondents' Motion for Summary Judgment on February 28, 1983, without any written opinion. (See petitioner's Appendix 1, hereinafter "Pet.'s App. 1"). On March 1, 1983 the Clerk of Courts filed a Journal Entry confirming the ruling (Id.), as required by Ohio Civil Rule 58 (p.xi, supra). Notice of the ruling also appeared in the (Cleveland) Daily Legal News, March 1, 1983 (App. 1), pursuant to Cuyahoga County Common

Pleas (Local) Rule of Court 19(A). (p. xii, supra).

The Central Scheduling Office of the Common Pleas Court also issued postcards to counsel announcing the ruling. Petitioner's counsel's postcard was purportedly received on April 19, 1983. (Pet.'s App. 16). Unlike the filing of a Journal Entry (Ohio Civil Rule 58) and the publication of the same in the (Cleveland) Daily Legal News (Local Court Rule 19(A)), there is no mandate or rule in Ohio or Cuyahoga County requiring postcard notice of judgments, said notice being merely a courtesy. In this connection, Ohio Appellate Rule 4(A) (p. ix, supra) strictly provides that a Notice of Appeal must be filed "within thirty days of the date of the entry of judgment", equally leaving to all attorneys, the responsibility to follow the progress of their cases through

the Court docket and/or the Daily Legal News.

Petitioner filed, on July 1, 1983, approximately two and one-half months following receipt of the postcard ruling, a Motion for Relief from Judgment pursuant to Ohio Rules of Civil Procedure 60(A) and/or (B)(5) (pp. xvi-xviii, supra), due to the Clerk of Court's alleged "clerical error" in issuing to him a late notice. Petitioner asked the trial court to vacate its February 28, 1983 order and to enter an order denying respondents' Joint Motion for Summary Judgment, or, alternatively, to vacate and then re-enter the order to reinstate petitioner's thirty day appeal period.

The trial court granted the exact (alternate) relief requested by petitioner. The court vacated its February 28, 1983 order due to "clerical

error" (Pet. App. 2), and then immediately reinstated its original ruling, granting respondents' Motion for Summary Judgment as of August 10, 1983 (Pet. App. 3), clearly for the purpose of reinstating petitioner's thirty day appeal period.

The Court of Appeals, properly finding that the trial court had abused Civil Rule 60, reversed the trial court, reinstated the trial court's original February 28, 1983 ruling, and dismissed petitioner's appeal, pursuant to Ohio Appellate Rule 4(A), for lack of jurisdiction due to petitioner's untimely filing of a Notice of Appeal. (The complete text of the Court of Appeals' Opinion is set forth as App. 4-24 in petitioner's Brief in support of his Petition for Writ). The Court of Appeals held that a

> "party's failure to be aware of a properly journalized and published judgment does not justify vacation of that judgment...[since one] who relies solely on local customs, such as the mailing of a notice, rather than the procedures set out by either the Ohio Rules of Civil Procedure or the local rules of court, does so at his own peril". (Pet. App. 12-13).

The Court of Appeals also determined that petitioner's Motion for Relief had not been filed within "a reasonable time", pursuant to Ohio Civil Rule 60(B). (Pet. App. 15-16). The Ohio Supreme Court refused to hear petitioner's appeal.

The following discussion will demonstrate that the Ohio Court of Appeals' decision was in conformity with well-reasoned, long-standing, and uniform legal precedent; that not only Ohio but other states and the Federal judiciary have likewise chosen, in the concern for judicial efficiency and the need for finality, not to relate,

to the time for appeal, actual mailed notice of a final trial court ruling; and that petitioner has not cited one case holding said rule of law unconstitutional. There is, in addition, no conflict concerning or important question of federal law involved here, mandating the denial of petitioner's Petition for Writ of Certiorari.

REASONS FOR NOT GRANTING THE WRIT

I. NOTICE OF THE TRIAL COURT RULING WAS CLEARLY ADEQUATE AND IN FULL COMPLIANCE WITH ALL CIVIL AND LOCAL RULES OF COURT, THUS UNDERMINING THE PURPORTED PREMISE FOR PETITIONER'S APPEAL

The sole basis for petitioner's appeal is the purported inadequate notice of the trial court's ruling, granting respondents' Motion for Summary Judgment. However, the authorities cited by petitioner involve either no notice prior to default judgment, or publication or inadequate notice of the original filing of an action. The instant action involves parties who had written Briefs supporting and opposing, respectively, respondents' Motion for Summary Judgment, and were thus clearly knowledgeable of the pendency of the action, brought by petitioner, and that a ruling, that could "end" the case, would be forthcoming shortly.

The ruling ensued, and was properly placed on the Court Docket (Pet. App. 1) in accordance with Ohio Civil Rule 58, and was published the following day in the (Cleveland) Daily Legal News, a newspaper containing daily notices of judicial and statutory rulings of primary import to attorneys, in accordance with Local Court Rule 19(A). (App. 1). The publication included the Judge's name, the case number and name--"Zerovnik v. E.F. Hutton Co." -- and the disposition of the case. Petitioner maintains that his attorney's name was "missing", thus making the notice "faulty" (and indeed, in violation of the United States Constitution).

The Ohio Court of Appeals thought otherwise (Pet. App. 11-14) and the Ohio Supreme Court refused to review the matter, for good reason. There was notice, in the exact manner prescribed by

law in this State and County, for final journal entries. That petitioner's counsel failed to follow the progress of his case, in order to perfect an appeal, does not raise any constitutional questions. Moreover, the adequacy of the notice, which was far more than required (See Americare Corp. v. Misenko, 10 Ohio St.3d 132 (1984); (Pet. App. 10-15)), is clearly not an issue in which to burden this Honorable Court.

II. THERE IS NO CONSTITUTIONAL RIGHT TO AN APPEAL OR TO ACTUAL NOTICE OF A FINAL JUDGMENT

Regardless of the adequacy of the notice of the trial court ruling, petitioner's Brief in support of his Petition is wholly without merit and incorrect, since there is no constitutional right to an appeal nor to actual notice of a final judgment entry in order to perfect the same. Moreover, petitioner's purported authority (pre-judgment attachments; condemnation proceedings; tax foreclosure sales, etc.) is not only totally inapposite and inapplicable to this action, but involves primarily original notice of the filing of an action, unlike the situation at hand. That petitioner was not entitled to actual notice of the journal entry is clear under Ohio law and supported by other States as well as the Federal judiciary. There was no constitutional

infringement here -- petitioner had his day in Court, with a full opportunity to be heard, and lost.

A. Failure To Provide Mailed Notice Of A Judgment Entry, Properly Journalized And Published In Accordance With State And Local Rules Of Court, Does Not Result In A Denial Of Due Process Or Any Purported Constitutional Safeguards

Petitioner's claim of being denied a constitutional right is totally unfounded and contrary to Ohio law, as well as foreign State and Federal law and/or rules, and petitioner has failed to support his theory with any relevant authority. Ohio Appellate Rule 4(A) mandates the filing of a notice of appeal within 30 days of "the entry of judgment". Though cleverly masked, petitioner is attempting to characterize this rule as unconstitutional, since it fails to provide for receipt of actual notice of the entry before the expiration of the appeal period. This exact issue was

met and properly rejected in Town and Country Drive-In Shopping Center, Inc. v. Abraham, 46 Ohio App.2d 262 (Frank. App. 1975):

> "Syllabus by the Court
>
> There is no requirement under the Ohio Rules of Civil Procedure to give a party to an action notice of the filing of the judgment and such a failure does not deny him due process of law."
>
> * * *
>
> "As to assignment of error no. 2, claiming that the denial of the appellant's motion for relief from judgment violates its constitutional right of due process of law under the fourteenth Amendment of the Constitution of the United States we merely state that all of the Ohio Rules of Civil Procedure, as well as the Ohio Rules of Appellate Procedure, have been promulgated and lawfully enacted in the State of Ohio pursuant to Section 5(b), Article IV of the Ohio Constitution, and the aspects of due process and their application have been considered." 46 Ohio App.2d at 268.

Further, the Ohio Supreme Court in Americare Corp. v. Misenko, 10 Ohio St.3d 132 (1984) recently upheld the dismissal of a notice of appeal that was not timely filed, despite the identical argument being raised by that plaintiff. The plaintiff in that case also argued that because it had not received actual notice of the judgment entry, as here, it was "denied the opportunity to timely appeal and the dismissal of the notice of appeal was hence unconstitutional as being violative of due process and equal protection". 10 Ohio St.3d at 133. The Court, however, rejected that argument, holding that actual notice of a judgment entry is not necessary in Ohio, and that where a judgment entry is properly journalized, the time period for filing a notice of appeal should not be tolled for lack of actual notice of the same. Declared the Supreme Court of

Ohio at 10 Ohio St.3d 134:

> "Furthermore, it is most noteworthy that no provision in Ohio law or rule of civil or appellate procedure requires that a party be given actual notice of the filing of a judgment entry. The procedure for appeal is clearly set forth in the Rules of Appellate Procedure. App.R. 3(A) requires that an appealing party must file a Notice of Appeal. The time period for the filing of the notice of appeal is set forth in App.R.4:
>
> > '(A) In a civil case the Notice of Appeal required by Rule 3 shall be filed with the Clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. ***'
> >
> > App.R.4(A) also provides that '***[a] judgment or order is entered within the meaning of the subdivision when it is filed with the clerk of the trial court for journalization.'
> >
> > App.R.4(A) complements Civ. R. 58, which provides in part that '[a] judgment is effective only when filed with the clerk for journalization. As evidenced by these

> rules, there are no provisions in the Rules of Appellate Procedure that actual notice of a judgment entry be given. See, also, Steadley v. Montanya (1981), 67 Ohio St.2d 297 [21 O.O.3d 187]." (underscoring added).

Similarly, the Court in Kiss v. Allstate Insurance Co., 10 Ohio App.3d 238 (Cuy. App. 1983) reiterated that:

> "...there is no requirement under the civil rules requiring courts to serve copies of final orders on the parties..." (underscoring added),

and dismissed, as untimely, an appeal instituted by a party who claimed, like the petitioner here, lack of notice of a final ruling. Accord: Bosco v. Euclid, 38 Ohio App.2d 40 (Cuy. App. 1974); Rose v. Rose, 23 Ohio App.2d 201 (Butler App. 1970).

Petitioner's purported authority to the contrary actually involves original notices of actions or default judgments, wholly inapplicable to this situation.

For example, in Milliken v. Meyer, 311 U.S. 457 (1940) this Court, in effect, upheld the constitutionality of long-arm jurisdiction. In Hess v. Pawloski, 274 U.S. 352 (1927) this Court similarly upheld the constitutionality of a statute authorizing service, on behalf of a defendant, on a State's Registrar [of Motor Vehicles], once the defendant had driven on that State's highways. Again, in Cunnius v. Reading School District, 1983 U.S. 458, 477 (1904), this Court upheld the constitutionality of a state statute authorizing service by publication "for the administration of the estate of an absentee. . . ."

Though this Court in Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950) found general publication notice unconstitutional in that case, that action involved a specific

New York statute concerning the notification necessary for trust companies to judicially settle its accounts. This Court was particularly concerned with an interested party's right to:

> "choose for himself whether to appear or default, acquiesce or contest," 339 U.S. at 314,

and is inapposite here, since once again, that case involved an original action. Contrary to petitioner's assertions in his Brief, Mullane does not require that notice of judgments be given to parties, but rather concerns only notice of proceedings, which petitioner clearly had here. Similarly, numerous other cases cited by petitioner, including Baggett v. Baggett, 541 S.W.2d 407 (Tenn. Sup. Ct. 1976); City of New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293 (1953); Schroeder v. City of New York, 371 U.S. 208 (1962); and Mennonite Board of Missions v. Adams, 462 U.S. 791

(1983), all involve original notice of an action, unlike the case at bar, where petitioner filed this lawsuit and was duly represented throughout the proceedings.

The "bottom-line" is that petitioner cited not one case holding that notice of a judgment entry is necessary to satisfy due process or other constitutional concerns. Indeed, the law outside Ohio is, like Ohio law, to the contrary.

Thus, in Cranman Insurance Agency v. Wilson Marine Sales & Service, Inc., 249 S.E.2d 631 (Ga. App. 1978), a case arising out of a virtually identical factual scenario as here, involving an alleged mailing problem of notice of a final order, and the vacation and re-entering of a judgment for appeal purposes, the Court held identically to the decision rendered by the Ohio Court of Appeals in the instant action:

> "...[C]ounsel were not entitled to notice of entry of judgment to start the 30-day period running...
>
> As has been consistently held, 'the burden is on the party desiring to take the appeal to determine when the judgment is filed in the trial court, and the burden is on the party desiring to appeal to file his notice of appeal within the 30-day period... Filing of the notice of appeal within 30 days as required...is a mandatory prerequisite to the attaching of appellate court jurisdiction... and it can not be dispensed with upon the ground that counsel did not know the order sought to be appealed had been filed..." 249 S.E.2d at 632-33.

Likewise, see also, Lopez v. Allied Concord Financial Corporation, 481 P.2d 700 (Sup. Ct. N.M. 1971); LeRoy v. Figure Skating Club of Minneapolis, 162 N.W.2d 248 (Sup. Ct. Minn. 1968); and Metron Steel Corp. v. Alby Mfg., Inc., 194 N.W. 2d 708 (Sup. Ct. Wisc. 1972). In none of these cases was the failure of actual notice of a judgment entry deemed, one

iota, to infringe on the constitutional safeguards of any person.

Indeed, even Federal Rule of Civil Procedure 77(d) (hereinafter "FRCP 77(d)") (p. xiv, supra), though providing that notice shall be served upon entry of an order, further provides that:

> "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed..."

The corresponding 1946 Committee Note To Amended Subdivision (d) provides, in pertinent part:

> "Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal... It would, therefore, be entirely unsafe for a party

> to rely on absence of notice from the clerk of the entry of a judgment..." (underscoring added)

In the instant action, after the entry of judgment, the entry was published in the (Cleveland) Daily Legal News, as required by Local Court Rule 19(A), an even greater mandated notice than in FRCP 77(d), since failure to comply with Local Court Rule 19(A) would, in effect, toll the applicable appeal period. (See Pet. App. 13-14). Moreover, the "custom" of mailing notices was codified, in FRCP 77(d), as a mere "convenience" -- not a prerequisite for the beginning of the appeal period. Thus, implicit in petitioner's position is that not only Ohio but other states following similar doctrines, as well as FRCP 77(d), in effect since 1946, must now be found unconstitutional. Clearly, the logical

and pragmatic reasons behind beginning the appeal period upon entry of judgment dictate otherwise.

Thus, in Wilson v. Atwood Group, 702 F.2d 77 (5th Cir. 1983) the Court, after discussing "the litigant's duty to diligently ascertain the status of his case without notification from the Clerk" (702 F.2d at 79), dismissed the appeal of a party who also failed to receive notice of a final entry due to alleged error in the Clerk of Court's office. Declared the Court at 702 F.2d 80:

> "Concerns of judicial efficiency and the need to remove cases from the Court's docket by simple rules without endless review mandate that judgments be final. We think the decision was made by this 1946 amendment [to FRCP 77(d)] to choose finality..."

Accord: Wagner v. United States, 316 F.2d 871 (2nd Cir. 1963).

Indeed, if this Court strikes down as unconstitutional Ohio Appellate Rule 4(A), and permits "late" appeals, not based upon the "entry of judgment" but rather upon receipt of "postcard notice", as petitioner is really asking beneath the rhetoric, then the onus for finality on all future judgment entries will no longer be on the parties or their counsel, as presently properly constituted, but rather on all Clerks of Courts. Numerous courts, including the Federal judiciary in promulgating and using the Federal Civil Rules, have made and re-affirmed sound policy judgments underlying the decision that the onus should remain on the parties to properly follow their cases. The Courts do not want the respective Clerks of Courts to become embroiled in depositions and record searches to determine when, and how, and if a notice was mailed. And it is clear

that the Courts do not want trial courts to continue the charade of perfunctorily granting Civil Rule 60(B) Motions and re-entering judgments as "substitutes for appeal". Town & Country Drive-In Shopping Center, Inc. v. Abraham, 46 Ohio App.2d 262, 266-67 (Frank. App. 1975); McCue v. Buckeye Union Insurance Co., 61 Ohio App.2d 101 (Cuy. App. 1979); Cranman Insurance Agency, supra.

Petitioner had a full and fair opportunity to be heard before the trial court rendered its judgment on respondents' Motion for Summary Judgment. Subsequently, petitioner had the burden to follow the progress of his own case, a burden which he neglected. Accordingly, petitioner's appeal was properly dismissed as late. There was no error and no constitutional deprivation or issue raised.

B. There Is No Constitutionally Guaranteed Right To Access To An Appellate Court, And Petitioner Suffered No Due Process Infringement Because Of His Failure To Perfect An Appeal On An Adverse Trial Court Ruling In This Civil Action

This Court has never found an inherent right to appeal. Instead, this Court has set forth a standard, based upon whether fundamental rights are involved, as to whether access to any court is being deprived in an unconstitutional manner. And, where access to a court is not essential to the exercise of fundamental constitutional rights, as here, the State will be free to allocate access to the courts on any system or classification which has a basis in reason. See United States v. Kras, 409 U.S. 434 (1973), and Ortwein v. Schwab, 410 U.S. 656 (1973).

In this connection, this Court has clearly held that access to appellate process is not a constitutionally safeguarded right or privilege:

> "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review." McKane v. Durston, 153 U.S. 867, 868 (1893).
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> * * *
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> "...[A] state is not required by the Federal Constitution to provide Appellate Courts or a right to Appellate review at all." Griffin v. Illinois, 351 U.S. 12, 18 (1956)
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> * * *
>
> "This Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system." Ortwein v. Schwab, supra, 410 U.S. at 660.

This Court and others, however, have upheld access to any court when a fundamental constitutional safeguard has been abridged. See Boddie v. Connecticut, 401 U.S. 371 (1971)(filing fee for indigents in divorce action held unconstitutional as violative of constitutionally guaranteed right of freedom of marital choice); Griffin v. Illinois, supra, (States required to provide free transcription to permit (timely) appeals for indigent prisoners whose liberty was at stake); and DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966), Johnson v. Avery, 393 U.S. 483 (1969), and U.S. Ex Rel Mayberry v. Prasse, 225 F. Supp. 752 (E.D. Pa. 1963)(where, in all three cases, prison officials confiscated materials or barred personal contact between innmates, physically and overtly blocking the appeal route for persons whose liberty, once again, was at stake). Where the rights at stake, however, were

not fundamental, the access to any court has not been deemed a matter of due process, but rather one of reasonableness, i.e., is the restriction or regulation rationally premised. Thus, in United States v. Kras and Ortwein v. Schwab, supra, this Court upheld, respectively, filing fees for (1) a bankruptcy petition and (2) an appeal by a welfare recipient whose benefits had been terminated. This Court in Ortwein v. Schwab held that procedural due process,

> "requires that a welfare recipient be given a pre-termination evidentiary hearing..." 410 U.S. at 659-660.

Similarly, in the case at bar, petitioner had his day in Court, and lost. Certainly his right to an appeal, in a case involving a claim for alleged emotional distress arising out of the sale of stock options, is of no greater import than a welfare recipient's right to

an appeal based upon termination of welfare benefits. In short, neither party can claim loss, by lack of access to an appellate court, of any fundamentally protected rights, particularly the petitioner, who is alleging negligence by a brokerage firm causing him emotional distress. Thus, the sole issue at hand is whether the rule of law, requiring attorneys to follow the progress of their own case absent actual notice of final judgment entries, has a rational basis. Ortwein v. Schwab, and United States v. Kras, supra.

In view of the rationale set forth above, involving the need for finality of judgments, judicial efficiency, and the great potential burden on Clerks of Courts if this doctrine is altered, it is manifest that the rule requiring attorneys to follow the progress of their own cases, properly and deeply rooted in American

jurisprudence, clearly has a rational and reasonable basis. Thus, petitioner clearly cannot meet his burden of establishing any constitutional violations in this case.

C. The State Court Rulings On Ohio Civil Rule 60 Bar An Appeal On Any Grounds, Have No Constitutional Overtones And, In Any Case, Were Correct

Petitioner's attempt to somehow establish a constitutional infringement based upon the Ohio Appellate Court's interpretation of Civil Rule 60 in this case, is entirely without foundation. Indeed, the fact that petitioner's Motion for Relief was held to be untimely filed (Pet. App. 15-16) precludes any appeal, on constitutional or other grounds. Moreover, the rulings concerning Ohio Civil Rule 60(A) and (B) were clearly correct.

1. Petitioner's Motion for Relief Was Not Filed Within A Reasonable Time As Required By Civil Rule 60(B), Thus Precluding Any Appeal

The Court of Appeals properly held that petitioner's Motion for Relief should have been denied for untimeliness (Pet. App. 14-15), thus precluding the within appeal, regardless of the grounds, i.e., assuming arguendo the validity of petitioner's claim of constitutional infringements for not having received actual notice of the final entry, petitioner failed to timely seek relief from the trial court after learning of the judgment in favor of the respondents. Moreover, the timeliness of a Civil Rule 60 Motion for Relief clearly does not involve sufficient grounds to merit this Court's review, and is an issue best left to a State court. See Brown v. Allen, 344 U.S. 443 (1952); Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982) cert. denied, 459

U.S. 1055 (1983); Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976). Viewing the merits, if necessary, it is nonetheless clear that the Court of Appeals properly decided this issue.

The Supreme Court of Ohio has set forth three requirements which must be demonstrated by a moving party in order to prevail on a Rule 60(B) motion:

> "(1) The party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time..." GTE Automatic Electric v. ARC Industries, 47 Ohio St.2d 146 (1976)(Syl. 2).

The third requirement necessitates a showing by evidentiary material that the Motion for Relief was made within a reasonable time. See Security Insurance Company v. Regional Transit Authority, 4 Ohio App.3d 24, 26 (Cuy. App. 1982).

Petitioner's two and one-half month delay in filing his Motion for Relief was properly determined not to constitute a reasonable time period under the facts of this case. Indeed, as the Court of Appeals correctly held, even after learning of the ruling on April 19, 1983, petitioner waited two and one-half months, with no explanation, to file his Motion for Relief:

> "Even assuming that [petitioner's] argument regarding customary notice is well taken, [petitioner] received a postcard from the clerk's office on April 19, 1983, notifying him of the court's adverse ruling, according to the affidavit of James McNamara. Yet no action was taken until July 1, 1983, when [petitioner] filed his motion for relief from judgment. Under the circumstances, a two and one-half month delay is not reasonable. Moreover, no explanation, evidentiary or otherwise, was given for waiting until July to file for relief." (Pet. App. 16).

See also Wilson v. Atwood Group, 702 F.2d 77 (5th Cir. 1983).

Accordingly, petitioner has no basis to urge any grounds for appeal, since his original Motion for Relief was untimely.

2. Ohio Civil Rule 60(A) Authorizes Only The Correction Of Clerical Mistake In Judgments Or The Record, And Not Substantive Changes, Such As The Vacation Of Judgments

The trial court's granting of petitioner's Motion for Relief from Judgment by vacating its February 28, 1983 order and later reinstating the identical order, so as to renew the time for appeal, was incorrect. Specifically, the trial court's apparent reliance on Ohio Civil Rule 60(A) was misplaced, legally unfounded, and improper, as the Court of Appeals properly determined.

The law is clear that Ohio Civil Rule 60(A) is applicable only to mundane clerical errors of transcription and the like with respect to the record, and not

to substantive changes, like the vacation of judgments. The Court of Appeals in the case at bar succinctly ruled on the inapplicability of Ohio Civil Rule 60(A):

> "The proper vehicle in which to allege the failure to receive proper notice of a court's ruling is Civ. R. 60(B)(5). State, ex rel. Pajestka v. Faulhaber (1977), 50 Ohio St.2d 41. Further, when a party institutes procedures for vacating a judgment, Civ. R. 60(B) is the obvious rule of choice, rather than Civ. R. 60(A). Musca v. Village of Chagrin Falls, (1981) 3 Ohio App.3d 192." (Pet. App. 9-10).

Both of the cases relied upon by the Court of Appeals clearly confirm that Civil Rule 60(A) was not intended as a vehicle to undermine, but rather to merely correct minor clerical errors in judgments.

Indeed, the Ohio Supreme Court foreclosed any question as to the applicability of Ohio Civil Rule 60(A) to claims like petitioner's in his Motion for Relief, holding, in State, ex rel.

Pajestka v. Faulhaber, 50 Ohio St.2d 41, 42 (1977), that where a party claims lack of notice of an entry and thereby wishes to extend the appeal,

> "the proper remedy...is to file a Motion for Relief from Judgment under Civ. R. 60(B)(5).

Similarly, the Court is Musca v. Village of Chagrin Falls, 3 Ohio App.3d 192, syllabus 1 (Cuy. App. 1981) distinguished the correction of clerical mistakes under Civil Rule 60(A) from substantive changes in judgments and held:

> "1. Civ. R. 60(A) authorizes the correction of clerical mistakes only. Substantive changes in orders, judgments or decrees are not within its purview."

Federal court decisions construing Federal Civil Rule 60(a), which is "very much like" the Ohio rule (see Jacoby, "Ohio Civil Practice", "Staff Notes to Rule 60 -- Comparison Between Ohio...and Federal Rule 60", p. 442) further confirm that Civil Rule 60(A) is not meant as a

vehicle for disputes involving questions of notice and/or where relief from the underlying judgment is involved, as here. Thus, declared the 7th and 2nd Circuit Courts of Appeals, respectively:

> "It is settled that...rule [60(a)] applies only to an error of transcription, copying, or calculation and not to a fundamental failure of discovery or notification." Bershal v. McDonough, 469 F.2d 1333, 1336 (7th Cir. 1972).
>
> * * *
>
> "Unlike the grant of a Rule 60 (b) motion, however, the grant of a Rule 60(a) motion does not lead to relief from the underlying judgment..." International Controls Corp. v. Vesco, 556 F.2d 665, 670 (7th Cir. 1977).

Indeed, the difference between Civil Rule 60(A) and (B) is clearly evident in the provisions themselves. The first sentence of Civil Rule 60(B) provides that "the court may relieve a party... from a final judgment..." Civil Rule 60(A), on the contrary, contains no such statement.

Accordingly, it is manifest that the trial court's apparent reliance on Civil Rule 60(A) in vacating its February 28, 1983 judgment (Pet. App.2) was totally improper. There was, in short, no basis under Civil Rule 60(A) for the trial court to have vacated and then reinstated a judgment, and the Court of Appeals properly determined that the trial court had committed significant error in so doing. Moreover, this decision was clearly one for a State court under State Civil Rules, it is not in conflict with any law cited by petitioner, it clearly raises no constitutional overtones whatever, and is certainly not of sufficient scope to merit review by this Court.

3. Civil Rule 60(B) Does Not Warrant The Granting Of A Motion For Relief From Judgment For The Purported Failure To Receive A Non-Mandatory Postcard From The Clerk of Courts Where An Entry Was Properly Journalized And Published In Accordance With The Civil Rules And Local Rules Of Court

Even if it is assumed that the trial court considered petitioner's Motion for Relief under Rule 60(B),[1] the trial court erred in granting the Motion and thereby vacating its February, 1983 original ruling, and was thus properly reversed by the Court of Appeals.

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[1] The trial court entry was premised on "a clerical error" (Pet. App. 2), which would appear to clearly fall within the terminology of Ohio Civil Rule 60(A), the use of which Rule, as demonstrated above, was clearly improper.

The only purported basis for a Civil Rule 60(B) Motion would have been petitioner's failure to receive postcard notice of the trial court ruling, and as documented above, it has been uniformly held that a court is not required, under the Rules of Civil Procedure or common law, to provide notice to parties of a judgment entry, or that the failure to render notice does nct toll the appeal period. See Americare Corp. v. Misenko, 10 Ohio St.3d 132 (1984); Cranman Insurance Agency v. Wilson Marine Sales & Service, 249 S.E.2d 631 (Ga. App. 1978); FRCP 77(d).

Petitioner's purported reliance on Steadley v. Montanya, 67 Ohio St.2d 297 (1981) before the Ohio courts and now this Court, was and is entirely misplaced. In Steadley, unlike the present action, there is no indication that the appellant

had received notice of the ruling in question through the Daily Legal News, as required under Local Court Rules. Moreover, in Steadley the trial court had orally promised the appellant to hold a hearing before issuing said ruling, a promise upon which the appellant relied. In the instant action, there is no evidence of any such promise with respect to respondents' Motion for Summary Judgment. Indeed, it is clear that the purpose of petitioner's Motion for Relief was to allow him time to appeal, wherein in Steadley, the Ohio Supreme Court found that the judgment had been vacated in good faith, due to the trial judge's breach of his promise to hold an oral hearing before ruling, and not, as here, merely as a "subterfuge [to circumvent] the jurisdictional time for filing a notice of appeal." 67 Ohio St.2d at 299.

Ohio courts have resoundingly rejected such an abuse of Civil Rule 60. In Town and Country Drive-In Shopping Center, Inc. v. Abraham, 46 Ohio App.2d 262, 266-267 (Frank. App. 1975), the appellate court recognized the policy against using Rule 60(B) as a substitute for appeal:

> "It has been set forth in many texts, as well as case law related to Civ. R. 60(B), that such rule cannot be used to circumvent or extend the time requirements by virtue of vacating a judgment and reinstating it in order to start the time for filing such notice of appeal to run anew. As stated in 7 Moore, Federal Practice, Section 60.29:
>
> > 'It, therefore, follows that a motion for relief on one or more of the six grounds stated in 60(b) for relief from a final judgment does not affect the finality of the judgment; and hence, does not toll the time for appeal from the final judgment.'
>
> Additionally, in Moore supra, at Section 60.30 we find:

> 'While in appropriate situations we believe that, within the time allowed for appeal, a district court may grant relief from judicial error under Rule 60(b), the rule cannot be used as a substitute for appeal. As an appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought...'
>
> We believe that such textual statement in fact sets forth the acceptable application of Civ. R. 60(B). Such rule basically is for the purpose of vacating voidable judgments and those judgments which have inherent defects, and the filing of a motion under such rule may not serve the purpose of allowing additional time for the filing of an otherwise barred notice of appeal,..."

In short, the law is clear that a purported failure to receive a postcard from the Clerk of Court is insufficient, as a matter of law and sound policy judgment, to warrant application of Civil Rule 60(B), particularly when the judgment entry was properly journalized and published as required by the Civil

Rules and the Local Rules of Court. The time for appeal passed (Ohio Appellate Rule 4(A)) and, accordingly, the Court of Appeals was unquestionably correct in holding that petitioner should not be permitted "to do by indirection that which he cannot do directly." In re Marginean, 87 Ohio L. Abs. 314, 317 (Cuy. App. 1961).

Moreover, there was no constitutional overtone in this ruling, no conflict among jurisdictions, and thus, like the determination on Ohio Civil Rule 60(A), should properly be left at the State court level.

CONCLUSION

THE PETITION SHOULD BE DENIED

Petitioner's theories of constitutional infringement are entirely without foundation in fact or law. He was not denied access to any court. Petitioner had his "day in court" before the trial court, which properly decided to grant respondents' Motion for Summary Judgment, and thus reject petitioner's ridiculously far-fetched claim. That petitioner failed to properly perfect his appeal rights, by relying on custom as opposed to rule, despite the trial court's compliance with the Ohio Civil Rules and the Local Rules of Court, constitutes no basis to raise alleged constitutional deprivation. That petitioner failed in his effort to abuse Civil Rule 60, by attempting to use it as a substitute for an improper and late appeal, constitutes no basis to raise alleged

constitutional deprivations. Moreover, petitioner can establish no denial of any fundamental rights, unlike the claimants in many of the cases he cites, who were improperly denied original access to courts, or whose life and liberty were at stake and were barred, monetarily or physically, from seeking appellate redress. And, there is a clear rational basis for beginning the time for appeal upon the entry of judgment, thus further undermining any alleged constitutional theories. Finally, in any case, the Ohio Court of Appeals held that petitioner's Motion for Relief was untimely, thus barring an appeal on any basis.

Accordingly, there is no reason that this Honorable Court should entertain this case. A lack of merit

in petitioner's claims and the lack of gravity of this entire matter, clearly compels the conclusion that this case should be left as properly determined by the Ohio State courts.

CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to The Supreme Court of Ohio were hand-delivered to Joel Levin, attorney for petitioner, 700 Engineers Building, Cleveland, Ohio 44114-1357, this 28th day of January, 1985.

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APPENDIX

THE DAILY LEGAL NEWS AND CLEVELAND RECORDER

Court of Common Pleas

Leo M. Spellacy, Presiding Judge

Record for Tues., March 1, 1983

COURTROOM 23-B
Judge Daniel O. Corrigan

Thomas J. Kilbane, Bailiff
051392 -- Khateeb vs. McKenzie.
Settled and dismissed at pltffs. cost.
018863 -- Zerovnik vs. E.F. Hutton Co.
Judgment for deft. at pltffs. cost.